

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 03-20949-CR-KING

UNITED STATES OF AMERICA,

Plaintiff,

v.

GUSTAVO BRU,
a.k.a. Julio,

Defendant.

**ORDER FINDING DEFENDANT'S APPEAL UNTIMELY WITHOUT GOOD CAUSE
OR BY REASON OF EXCUSABLE NEGLIGENCE**

THIS CAUSE comes before the Court upon the Eleventh Circuit's mandate (DE #115), entered September 21, 2010, ordering this Court to determine the reason for Defendant's untimely appeal. On October 30, 2010, this Court complied with the Eleventh Circuit's mandate, entering an Order (DE #116) requesting that Defendant file an explanation for his appeal's untimeliness.¹ Having considered the responses filed by all interested parties, the Court now determines that Defendant's untimeliness was not for good cause or caused by excusable neglect.

In Defendant's response, he stated that he told his then-counsel to "appeal [Defendant's] sentence and file a notice of appeal, but counsel, contrary to [Defendant's] direction, failed to file a notice of appeal within 14 days." (DE #121 at 2). Defendant further claims that, because the Government did not object to appointment of appellate counsel on Defendant's behalf, the Government implicitly recognized the merits of Defendant's appeal. (DE #121 at 2-3).

¹ Defendant filed a Notice of Response (DE #121) on October 24, 2010. This Court subsequently ordered other interested parties to reply (DE #122). The Government responded (DE #123) on October 27, 2010, while Defendant's sentencing counsel responded (DE #125) on November 3, 2010.

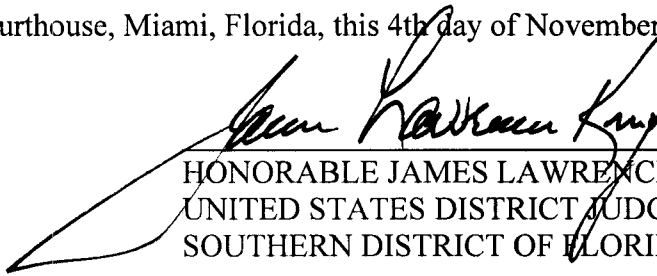
As is evident from its response filed with this Court, the Government disagrees with Defendant. According to the Government, the record suggests that Defendant's appeal was untimely not because of excusable neglect but because of the factual circumstances of Defendant's sentencing. Namely, the Government notes that, at sentencing, this Court granted both sentencing reductions requested by Defendant's counsel. (DE #1-2). These reductions reduced the guideline recommendation from 151-188 months down to 108-135 months, which the Government notes constituted a four-year reduction. Further, the Government notes that the Court advised Defendant of his right to appeal and the time within which to do so.

The response provided by Defendant's former counsel comports with the Government's position. According to counsel, he explained to Defendant after sentencing that, in his "legal opinion, [Defendant] had no bases whatsoever for an appeal, since he received everything he wanted. I further told him that if, in fact, he tried to appeal, he would open the door for the Government to cross-appeal and he may well loose [sic] the two points he received for acceptance of responsibility." (DE #125 at 2). Nonetheless, counsel advised Defendant that if he still wished to appeal, he should advise counsel. Counsel never heard from Defendant and therefore never filed a Notice of Appeal on his behalf. *Id.*

Upon consideration of the record before it and the transcript of Defendant's sentencing hearing (DE #105), the Court finds that Defendant had no good cause for his untimely appeal. Instead, having prevailed on the merits of his objections, Defendant was in position to appeal the basis of his sentence. Moreover, Defendant was specifically advised – both by the Court and by his counsel – of the relevant limitation period regarding his appellate rights, and his failure to act within that time cannot rightly be attributed to his counsel.

Accordingly, after careful consideration, it is **ORDERED, ADJUDGED** and **DECREED** that Defendant's untimely appeal was neither attributable to good cause nor excusable neglect.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 4th day of November, 2010.



HONORABLE JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:

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